



Waging War on the Obesity Epidemic: Are Regulatory Measures the Answer?

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WAGING WAR ON THE OBESITY EPIDEMIC:
ARE REGULATORY MEASURES THE ANSWER?

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ABSTRACT

Obesity and overweight are matters of global concern. The rise in obesity has led to a plethora of diet-related diseases that place a heavy financial burden on the citizens as well as their governments. This paper surveys the many regulatory measures that have been enacted in the United States and abroad in an attempt to curb the obesity epidemic. In an environment where more meals are eaten out of frozen dinner trays and outside the home, legislators have attempted to push consumers toward healthier meal options by mandating that restaurants provide nutritional information at the point of purchase. Government and private programs have been established to help educate children as well as adults about how to lead healthier lives. These programs target diet as well as exercise. Legislators have also attempted to make unhealthy foods less attractive by imposing taxes on unhealthy foods and limiting the kinds of advertising campaigns that corporations can engage in. Finally, there have been disclosure requirements as well as outright bans on unhealthy ingredients in order to prevent consumers from unwittingly ingesting products that are harmful to their health. Many of these regulatory measures have been successful in increasing consumer awareness should over time decrease the incidence of obesity and diet related diseases. The regulations discussed here are only the tip of the iceberg but they demonstrate that regulation can at least provide part of the solution to the obesity epidemic.

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I. INTRODUCTION

Human beings used to hunt and gather to scrounge up just enough food to survive harsh winters and times of famine or drought. Most modern human beings live in an entirely different world. If people want to eat they can pick up the phone and have food delivered to their doorsteps. Many college students will even see the phone call as an archaic method of acquiring food: many of them use online services to place their orders electronically. The point is that food is everywhere. Easier access to it has lead to larger waistlines and health concerns all over the world. In recent years, there has been an explosion in the rate of overweight and obesity in both adults and children.

This paper surveys some of the research in the area of obesity to identify the causes of the recent surge in rates of obesity and diet-related diseases. There is a range of explanations as why we have seen a sudden change. Some point to evolution itself as the root of the cause while others blame the changing culture of the world and globalization. Whatever the reason may be, solutions are needed. Not only do diet related diseases place a heavy burden on the affected individuals, the cost of treating those diseases places an even heavier burden on the government and health care systems in general. Many of these diet-related diseases are preventable so the best thing to do is find ways to stop them before they even begin to develop.

Legislators at all levels of government have proposed regulations intended to help educate consumers, influence their decisions in the marketplace and even prevent them from having access to unhealthy items at all. As with any kind of regulation, many of these measures have been met with resistance from private citizens, public interest organizations and the interested corporations. Most of the regulatory programs to be discussed have been successful in

achieving their stated goals even if only minimally at first. The success of these programs demonstrates that heavy regulation may indeed be the answer.

II. **OVERVIEW OF OBESITY IN THE UNITED STATES: AMERICA'S UNHEALTHY DIET**

A. **Obesity Trends: A Cause for National Concern**

1. **Rates of obesity coincide with rates of serious health complications.**

Obesity is an issue of global concern. Researchers around the world are trying to determine what has led to the crisis and are proposing solutions to address it. The United State is one of the countries most affected by obesity and overweight. Recent statistics compiled by the World Health Organization show that the United States is among the top fifteen reporting nations with a high percentage of both obese and overweight adults.¹ The numbers are cause for serious concern. In 2000, the National Health and Nutrition Examination Survey (NHANES) showed that approximately sixty-five percent of adult Americans were overweight or obese and approximately thirty percent of children aged six through nineteen were overweight.² These numbers are particularly startling because they are three times as high as they were only thirty years before in a previous NHANES study.³ In 2009, the Centers for Disease Control and Prevention (CDC) collected obesity data on all fifty states.⁴ The agency has found that thirty-

¹ Eloisa C. Rodriguez-Dod, *It's Not a Small World After All: Regulating Obesity Globally*, 79 Miss. L.J. 697, 699 (2010).

² Marie-Pierre St.-Onge, Kathleen L. Keller, & Steven B. Heymsfield, *Changes in childhood food consumption patterns: a cause for concern in light of increasing body weights*, 78 Am. J. Clin. Nutr. 1068, 1068 (2003).

³ *Id.* at 1068.

⁴ Centers for Disease Control and Prevention, Report on *U.S. Obesity Trends*, available at <http://www.cdc.gov/obesity/data/trends.html> (last visited April 1, 2011) (The CDC defines obesity as a body mass index (BMI) of 30 or greater. BMI is calculated from a person's weight and height and provides a reasonable indicator of body fatness and weight categories that may lead to health problems. The CDC is concerned with obesity in part because it has identified it as a major risk factor for cardiovascular disease, certain types of cancer, and type 2 diabetes.)

three states have a prevalence of obesity equal to or greater than 25% and nine states have a prevalence of obesity equal to or greater than 30%.⁵ These numbers demonstrate that obesity is a nationwide problem, not merely a geographic one, which merits attention from national agencies like the FDA that can help provide part of the solution through regulation.

Fortunately, the latest NHANES study analyzing the period between 1999-2000 and 2007-2008 has not shown a significant increase in the prevalence of obesity for any age group.⁶ The prevalence of obesity seems to have leveled off in recent years. Unfortunately, there has been no decrease either. The level of obesity and overweight in this country is still at an intolerable high. Regulators cannot be content with the fact that the rates seem to be holding steady. Work still has to be done to push the statistical trend in the other direction.

Researchers have come up with many explanations for the dramatic increase in the incidence of obesity and a great deal of them involve changes in the American environment and everyday culture.⁷ Environmental influences that affect eating behaviors, many of which will be discussed at greater length below, include changes in the types of foods available for consumption, an increased reliance on foods prepared outside the home, the manner in which foods are advertised and promoted, the high cost of healthy foods and the low cost of highly processed items, increased portion sizes, and the fact that there are more families in which both parents work full-time jobs.⁸ Not only have there been changes in the way that American's eat but there have been major changes in the way that they spend their free time. Instead of playing

⁵ *Id.*

⁶ Cynthia Ogden & Margaret Carroll, *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963-1965 Through 2007-2008*, National Center for Health Statistics June 2010 Report (2010) available at http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08.htm (last visited April 1, 2011).

⁷ St.-Onge, Keller, & Heymsfield, *supra* note 2, at 1068.

⁸ *Id.* at 1068-69.

outside with friends, children and teenagers play computer games and connect with their friends via instant messaging or SMS from the comfort of their homes. Although parents might rejoice at the fact that their children spend more time in doors and out of harm's way, this behavior is problematic because research has shown that low physical activity and high television viewing are also associated with the increase in obesity.⁹

The increased rate of obesity is a cause for concern because being overweight is not only less aesthetically appealing; it comes with the increased risk for health complications. The prevalence of childhood obesity is needs to be addressed because many adult diseases have their origin in childhood.¹⁰ In the United States, chronic illnesses and health problems attributable to diet represent the most serious threat to public health with the number of deaths ascribable to obesity currently at around 280,000 per year.¹¹ More than 64 million Americans have some kind of cardiovascular disease, 50 million are hypertensive, 11 million have diabetes and 37 million maintain high-risk total cholesterol concentrations.¹² Cancer is the second leading cause of death in the U.S. and nearly one third of all cancer deaths are due to nutritional factors including obesity.¹³ Many of these diseases are preventable with a healthy diet. We will make the most headway on these issues if obesity can be treated or prevented early on in children.

Diabetes is one of the diseases most related to overweight and obesity. The prevalence of type-2 diabetes has increased in many developed countries (where high fat foods are readily

⁹ *Id.* at 1071.

¹⁰ *Id.* at 1068.

¹¹ Loren Cordain, S. Boyd Eaton, Anthony Sebastian, Neil Mann, Staffan Lindeberg, Bruce A. Watkins, James H. O'Keefe, & Janette Brand-Miller, *Origins and evolution of the Western diet: health implications for the 21st century*, 81 Am. J. Clin. Nutr. 341, 341 (2005).

¹² *Id.*

¹³ *Id.* at 342.

available) in the past decade.¹⁴ A 1996 report showed that cases of type-2 diabetes increased from 2-4% of children from birth to nineteen years of age before 1992 to 16% of the same group in a 1994 follow up.¹⁵ Among the 10-19 year olds who participated in the study, 3-10% of new diabetes cases before 1992 were type-2 diabetes, while in 1994, type-2 diabetes represented 33% of new cases of diabetes.¹⁶ BMI has also been found to be higher in children and adolescents with diabetes, providing evidence that developing diabetes is linked to being overweight.¹⁷ Thus, if we decrease the prevalence of overweight in the population, we will likely see a decrease in new cases of type-2 diabetes. Overweight and obesity in children is also a concern because of the relationship between excess weight and developmental abnormalities due to the prolonged exposure to enlarged adipose tissue stores incurred by early-onset weight gain.¹⁸ In adults, large amounts of visceral adipose tissue have been linked to increased insulin resistance and risk of metabolic syndrome.¹⁹

2. Obesity and poor nutrition should be attacked with regulation.

The cost of health care attributed to weight related ailments is a heavy burden on the state and federal governments. A recent study conducted by the Center for Disease Control and Prevention along with the American Diabetes Association calculated that the country's diabetes epidemic costs the United States \$174 billion per year.²⁰ As noted previously, diabetes is just one of the many diseases related to obesity. Therefore, this figure only reflects a fraction of the

¹⁴ St.-Onge, Keller, & Heymfield, *supra* note 2, at 1071.

¹⁵ *Id.*

¹⁶ *Id.* Previously, the incidence of diabetes in children was dominated by type-1 cases.

¹⁷ *Id.*

¹⁸ *Id.* at 1068.

¹⁹ *Id.* at 1071.

²⁰ Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh in on Wellness*, 5 Ind. Health L. Rev. 185, 188 (2008).

economic burden that obesity related diseases place on the system. Because obesity related illnesses are such a tax on government resources it stands to reason that the government would have an interest in preventing the development of such diseases and educating citizens on how to lead healthier lives. Research indicates that a majority of Americans believe the government should do something about the obesity crisis and in particular that state governments should use educational programs to promote healthier lifestyles.²¹ There are of course equally vocal groups that believe government action in the realm of obesity would be intrusive, paternalistic and violative of constitutional rights in the areas of privacy and free speech. Those groups refer to advocates of government action as “grease police,” “calorie cops,” and “exercise radicals.”²² In recent years, government agencies at all levels, local state and federal, have taken some sort of action to promote health and wellness and influence consumer decision-making. Several examples of these measures will be discussed below.

B. The culture of eating has changed.

1. Evolution and technological advances have contributed to obesity.

Some explanations for the sudden peak in obesity rates go as far back as 10,000 years. They are based on the premise that we are not evolutionarily equipped to process the foods that dominate the human diet today. These researchers believe that many of the diseases of Western civilization can be blamed on the combination of our ancient genome and the nutritional qualities of recently introduced foods.²³ Cordain et al. posit that contemporary humans are genetically adapted to the environment of their ancestors and have experienced a kind of shock because of

²¹ *Id.*

²² *Id.* at 189.

²³ Cordain et al., *supra* note 11, at 341.

the kinds of foods that have been made available in recent history.²⁴ For example, although dairy products, cereals, refined sugars, refined vegetable oils, and alcohol make up 72.1% of the total daily energy consumed by all people in the United States, these foods almost entirely absent from the typical pre-agricultural human diet.²⁵ Certainly, human ancestors did not enjoy the surplus that many of today's Americans do.

More recent changes in the basic ingredients Americans put into foods have also had an effect on weight gain across the United States. The per capita consumption of all refined sugar in the U.S. was 69.1 kg in 2000, a 13.6 kg increase from 1970.²⁶ This increase was enabled by chromatographic fructose enrichment technology in the late 1970s, when high fructose corn syrup started being produced in mass quantity and used in increasing amounts to date.²⁷ It is quite difficult to find a sweetened product on today's shelves that does not contain high fructose corn syrup in some quantity. Between 1909 and 1999 there has been a striking increase in the use of vegetable oils for cooking.²⁸ In contrast, human ancestors seem to have used most of their oils for nonfood purposes like lubrication and medicine rather than cooking.²⁹ One of the biggest changes in the food supply has been the consumption of animal fats. Not only did human ancestors get most of their energy from food items they could gather, but when they did eat animals, they were nowhere near as fat-laden as the animals consumed today.³⁰ Animals in the wild are only store excess fat in the winter months whereas domesticated animals used for food are overfed for quicker production. Until 1850 American cattle were free range or pasture fed

²⁴ *Id.*

²⁵ *Id.* at 342. These basic ingredients form the building blocks of many of our most popular processed foods like pizza, bagels, soft drinks, candy and ice cream.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 345.

and typically slaughtered at between four and five years of age.³¹ By 1885, however, feedlots had advanced to the point where they could slaughter a steer in 24 months.³² Although, these livestock are ready for consumption much quicker than in the past, their meat is nowhere near as healthy as it was when human ancestors hunted their food.

Globalization has also had a tremendous effect on human food consumption. People no longer have to wait for fruits and vegetables to be in season because they are shipped to local supermarkets from all over the world. This also increases the options that are available for consumption at any given time, which can lead to overeating. Studies have also reported that the per capita consumption of coffee, milk, eggs, and red meat has seen a sharp decline in the past thirty years while cheese, soft drink and poultry consumption have increased.³³ This is due in part to the fact that many of these items are imported or in the case of chickens, mass-produced at incredible rates that were not possible without modern technology.

2. The culture of eating has changed.

There is evidence that another major contributor to the obesity epidemic is the change in the culture of eating in this country's more recent history. The modern eating environment has had a huge effect on the way that children eat.³⁴ The eating habits that children learn stay with them into adulthood making children's habits of particular concern. Surveys conducted in the 1970s, 1980s, and 1990s show that there has been a decrease in the percentage of energy intake from foods consumed at home, while at the same time, the proportion of energy intake coming

³¹ *Id.*

³² *Id.* The meat in these cattle exhibited "marbled" meat a trait that is rarely found in wild animals or those that are free range or pasture-fed.

³³ CHANGING STRUCTURE OF GLOBAL FOOD CONSUMPTION AND TRADE: AN INTRODUCTION 1 (Anita Regmi ed. 2001).

³⁴ St.-Onge, Keller, & Heymsfield, *supra* note 2, at 1069.

from foods consumed in restaurants and fast food chains has increased over the same period.³⁵ Americans simply aren't eating at home around the family dinner table as much as they used to. The amount of money spent on foods away from home has also increased from 25% of total food expenditures in 1977-1978 to 40% in 1995.³⁶ Spending more of the food budget on restaurant food leaves less money for high quality groceries. In addition, restaurant meals are generally larger and contain more overall calories than meals prepared in the home.³⁷ An increase in food eaten outside of the home has also been associated with greater intake of soft drinks and lower intakes of fruit, vegetables, grains, and milk.³⁸ Meals away from home have also been shown to be higher in fat, saturated fat, and sodium.³⁹ Those same meals are also lower in fiber, iron, and calcium than meals prepared in the home.⁴⁰ Eating outside the home is bad for America's health and yet people are doing it more now than ever.

Eating out is not the only change in our habits to affect weight gain. In the past three decades, the prevalence of snacking has increased alongside the increase in the prevalence of obesity.⁴¹ Increased snacking would not necessarily be a problem if people were snacking on celery sticks and apple slices but the data show that instead, they are increasingly snacking on salty foods, candy and soft drinks.⁴² Thus, the combination of fast food use and poor snacking habits show that the quality of the adolescent diet has deteriorated over time. This is also

³⁵ *Id.* In the 1977-1978 Nationwide Food Consumption Survey 74.1% of adolescents' total daily energy came from foods consumed at home but this proportion decreased to 68.3% in the 1989-1991 study and again dropped to 60.5% in the 1994-1996 survey.

³⁶ *Id.*

³⁷ Devon E. Winkles, *Weighing the Value of Information: Why the Federal Government Should Require Nutrition Labeling for Food Served in Restaurants*, 59 Emory L.J. 549, 552 (2009).

³⁸ St.-Onge, Keller, & Heymsfield, *supra* note 2, at 1069.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* Studies showed an increase in this type of snacking from 1977 to 1996.

compounded by the more sedentary lifestyle that young Americans are leading today. Unfortunately, the one place where regulation can have the most influence on the young American's diet is in the school system and yet, the school lunch program is full of nutritional failures as will be demonstrated at length below.

These changes in the types of foods consumed by Americans have been accompanied by an increase in the consumption of soft drinks. These drinks are problematic because they add no nutritional value to the diet and yet they are packed with refined sugars and excess calories. Soft drink consumption by adolescent boys has more than tripled in the last three decades with the consumption of milk showing a steady decrease over the same period of time.⁴³ Such a change has serious health implications. When milk is displaced in the diet, one of the best sources of nutrients like protein, calcium, and vitamins B-2, B-12, and D is lost and many of these vitamins are not easily found in other foods.⁴⁴ Longitudinal studies have in fact linked increased soft drink consumption with weight gain and obesity in children.⁴⁵ The presence of sugary beverages in schools provides students with easy access to these unhealthy options. However, beverage corporations have a stronghold on schools in need of funds and efforts to regulate against them have been met with a great deal of resistance. As discussed below, the soft-drink companies have been successful in keeping their vending machines in schools and preventing their goods from being subject to junk food taxes because of their strong lobbying power. In this arena, regulators have their work cut out for them.

⁴³ *Id.* at 1070.

⁴⁴ *Id.*

⁴⁵ *Id.* The National School Lunch Program prescribes a particular energy and nutrition profile for the lunches but its guidelines are often not followed by the schools or the companies to which they outsource their school lunch programs.

C. The Changing Cost of Food

1. Greater purchasing power contributes to obesity.

Purchasing power has had effects on the way people eat at both ends of the spectrum. On the one hand, more money gives people the ability to buy more food be it, healthier food or more low nutrient, high energy food. On the other, people with less purchasing power have less opportunity to buy healthy high nutrient foods and they have no choice but to purchase less expensive energy dense foods.

Per capita income levels of households have seen large increases in recent history.⁴⁶ Not surprisingly, there are differences in the kinds of food items that high-income countries buy as compared to their low-income country counterparts. Consumers in the United States spend a great deal of their food budget on meat, whereas consumers in low-income countries in Africa and Asia spend the greater part of their food budget on cereal products.⁴⁷ Better trade and transportation of food items have increased selection and availability.⁴⁸ With unlimited choice and unlimited availability of food year-round, consumers may over-indulge. Instead of taking unhealthy foods out of their diets when there is access to healthy foods, some consumers may just add the healthy foods to their already energy-dense diet, leading to even more excess calories.⁴⁹ With more purchasing power, consumers don't need to maximize their budgets by spending on high nutrient foods to sustain themselves. Instead, they buy more and more high-energy low nutrient foods that are packed with flavor and more importantly, empty calories that

⁴⁶ Regmi, *supra* note 33, at 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ U.S. Department of Agriculture, *Economic Research Service Summary: Access to Affordable and Nutritious Food*, 3 available at <http://www.ers.usda.gov/Publications/AP/AP036/> (last visited April 1, 2011).

they never have the opportunity to burn off.⁵⁰

2. Less access to healthful foods puts the poor at greater risk.

a. Disparity in food prices

As income levels increase, consumers tend to change the food items they purchase on a regular basis.⁵¹ For example, when consumers have more money to spend, they switch from store brand items to name brand options or even imports; they also switch from red meat to poultry and fish.⁵² Unfortunately, not everyone has experienced an income bump and in fact, the most recent recession has made consumers cut corners everywhere they can, including their food budgets. The disparity in cost between healthful foods and nutrient poor foods is undermining nutrition and public health according to the World health Organization.⁵³ Policy changes are needed to address the growing disparity and give people the power to choose healthier foods and lead overall healthier lives.

Studies have shown that foods that are higher in nutritional value come at a higher cost per unit than those that are less nutritious and more energy dense.⁵⁴ Others have shown that the cost of fruits and vegetables has increased over time to a greater extent than other foods in the United States.⁵⁵ While people may have more money overall to spend on food, healthful food is

⁵⁰ See Monsivais, Mclain, & Drewnowski, *The rising disparity in the price of healthful foods: 2004-2008*, 35 Food Policy 514, 514 (2010).

⁵¹ Regmi, *supra* note 33, at 2.

⁵² *Id.*

⁵³ Monsivais, Mclain, & Drewnowski, *supra* note 50, at 515.

⁵⁴ *Id.* (citing N. Darmon et al. *A nutrient density standard for vegetables and fruits: Nutrients per calorie and nutrients per unit cost*, 105 J. Am. Dietetic Assoc. 1881 (2005), M. Maillot et al., *Nutrient-dense food groups have high energy costs: an econometric approach to nutrient profiling*, 137 J. of Nutr. 1815 (2007) and; P. Monsivais & A. Drewnowski, *The rising cost of low-energy-density foods*, 107 J. Am. Dietetic Assoc. 2071 (2007)).

⁵⁵ *Id.* (citing J. Putnam et al., *U.S. per capita food supply trends: more calories, refined carbohydrates, and fats.*, 25 Food Review 2 (2002); R. Sturm, *Childhood Obesity – what we can*

costing more and more, making it difficult to fill one's grocery cart with healthful items. Thus, in fact, it is as though, the household food budget has not increased at all. Because of rising costs, consumers can't do any more with their money than they could before.

These price differences are not just anecdotal. A recent study by Monsivais et al. analyzed food prices over a four-year period and found that healthful foods do indeed cost more and their prices have increased at a faster pace than their unhealthy counterparts.⁵⁶ Their study was in response to concerns presented by Basiotis et al. in 2004 finding that the American diet is becoming energy-rich and nutrient poor.⁵⁷ The Monsivais study tracked prices of the same items in several different stores over a four-year period. The items were divided into energy-dense and nutrient-dense categories. The energy-dense category included such items as refined grains, added sugars, and added fats. (Recall that these are the foods that were not available to human ancestors.) The nutrient-dense category included whole grains, lean meats, low fat dairy products, vegetables and fruits. The mean price increase for all foods and beverages in the study was 25.2% between 2004 and 2008.⁵⁸ However, there was a significant difference between the rising cost of the least nutrient dense foods and the most nutrient dense foods. Those foods in the lowest nutrient density group saw an increase in price of 16.1% while those in the most nutrient dense group saw an increase in price of 29.2%.⁵⁹ Interestingly, those foods with the highest energy concentration (the least nutrition content) saw the smallest increase in time over the four-year period. Items in the study with the highest energy concentration increased in price by only

learn from existing data on societal trends, part 2, 2 Preventing Chronic Disease A20 (2005) and; T. Christian & I. Rashad, *Trends in U.S. Food Prices: 1950-2007*, 7 Econ. & Human Biology 113 (2009)).

⁵⁶ Monsivais, McLain, & Drewnowski, *supra* note 50.

⁵⁷ *Id.* at 514.

⁵⁸ *Id.* at 517.

⁵⁹ *Id.*

12.2 % while those with the lowest energy concentration increased by 41%.⁶⁰ What these results indicate is that price increases in healthful foods in recent history may pose a barrier to a healthy diet for many people. If income doesn't start to increase as rapidly or more rapidly than the cost of food, people's ability to purchase healthy foods will continue to be compromised.

The affordability of the energy dense (less healthful) items in the United States' food supply has been attributed to the ability to mass-produce many food items. Some have argued that agricultural subsidies that increase sugars and fats in the food supply are to blame for the growing rates of obesity and chronic disease.⁶¹ Many propose that the answer to the problem would be doing away with those subsidies. However, economic models indicate that government subsidies to producers of crops like corn are not to blame.⁶² Instead, researchers argue that blame should be placed on the increase in meat consumption in developing countries, the use of food items for biofuels, and the rising cost of transporting foods over long distances due to increases in oil prices.⁶³ Healthier food items that need to be refrigerated during transport like fresh produce are particularly susceptible to the rising cost of energy needed to transport them.⁶⁴ Thus, the fact that these foods are more expensive makes them harder to come by, leaving people with more unhealthy foods in their diets.

b. Food Deserts

Even if consumers were willing or able to find the money in their budgets for fresh fruits and vegetables, not everyone has access to those items. Limited access to nutritious food and convenient access to less nutritious food is thought to be linked to poor diets, which ultimately

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 519.

⁶³ *Id.*

⁶⁴ *Id.*

lead to overweight, obesity and diet related diseases.⁶⁵ The CDC, along with others concerned about access to healthy food items, define “food deserts” as “areas that lack access to affordable fruits, vegetables, whole grains, low-fat milk, and other foods that make up the full range of a healthy diet.”⁶⁶ Research indicates that food deserts do exist in the United States.⁶⁷ A United States Department of Agriculture (USDA) study found that access to a supermarket or large grocery store is a problem for a small percentage of American households.⁶⁸

A survey of American households found that 2.3 million (or 2.2%) are located more than one mile from a supermarket and do not have access to transportation.⁶⁹ When asked direct questions about food access, nearly six percent of households say that they do not always have the food that they want or need because of access related problems.⁷⁰ Inability to access supermarkets and other large grocery stores is a problem for two reasons: price and availability. Small convenience stores may not carry all the foods necessary for a balanced diet and often have limited quantities for large communities.⁷¹ Studies have also revealed that when healthy items are available in local convenience stores, they come at a higher cost to the consumer than if they had been purchased in a supermarket.⁷²

One way to alleviate the problem of food deserts may be public projects such as farmers’ markets, community gardens, and youth agricultural and culinary training programs.⁷³ These programs have become increasingly popular in recent years and can be implemented in both rural

⁶⁵ U.S. Dept. of Agriculture, *supra* note 49, at 1.

⁶⁶ Centers for Disease Control and Prevention, *Food Deserts*, (April 1, 2011, 3:05 PM), <http://www.cdc.gov/Features/FoodDeserts/>.

⁶⁷ *Id.*

⁶⁸ U.S. Dept. of Agriculture, *supra* note 49, at 1.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 3.

and urban settings.⁷⁴ The USDA's has set up a Community Food Projects Competitive Grant program to help fund and nurture such programs.⁷⁵ Provided that communities are made aware of such programs, they can be valuable tools in the task of providing more affordable access to healthful foods. More community projects such as these are a good response to the problem of food deserts but more is needed. Local governments can also do a better job of attracting large supermarkets to underserved areas by granting tax breaks or other incentives that will make those locations more attractive to large chain grocery providers.

III. RESTAURANT MENU LABELING

A. Why Restaurant Labeling is so important

Given that the culture of food is shifting to one that eats more meals away from home, regulatory measures that target this behavior are a good place to start. Restaurant menu labeling laws seek to inform consumers about the nutritional value of foods served in restaurants and fast food chains in the hope that having that information will lead consumers to make more healthful choices.

Studies show that consumers at chain restaurants usually underestimate the calories contained in the foods they order while at the same time overestimating how healthy those foods are in reality.⁷⁶ Calories are considered the most important element of nutritional information with regard to obesity.⁷⁷ Thus, providing consumers with information about calories is a priority for legislators. When teenagers eat a meal away from home, they add an average 108 more

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Brent Bernell, *The History and Impact of the New York City Menu Labeling Law*, 65 Food & Drug L.J. 839, 842-43 (2010).

⁷⁷ *Id.* at 841.

calories to their daily total than they would consume if they had eaten that meal at home.⁷⁸ This effect is not limited to young or uneducated consumers. Even professional nutrition experts that have been studied underestimate calories in chain restaurants by “between 200 and 600 calories.”⁷⁹ If even the most sophisticated consumers are not able to accurately determine how many calories they are consuming on the go, it stands to reason that they can overeat and over time gain weight if they don’t compensate for the excess calories with exercise. The Board of Health in New York City, the first jurisdiction to propose menu labeling laws, stated that the “systematic underestimation of calories suggests that consumers have distorted perceptions of calorie content” and they have “been misled to view oversized, high-calorie portions as ‘normal’ portions, containing acceptable numbers of calories.”⁸⁰ The city determined that there was a gap in calorie information.⁸¹ Placing information about calories within the grasp of consumers seems to be the logical solution to the problem but only if it influences consumer choice enough to make lasting changes in the way people eat.

The best analogy to providing calorie information on restaurant menus is nutrition labeling on packaged goods. There is evidence that nutrition labeling, as mandated by the Nutrition Education Labeling Act (“NLEA”), has helped increase consumer awareness of nutrition information.⁸² However, awareness is not enough. The labeling must actually influence decisions. Congressional findings indicate that around 75% of adults use NLEA labels on packaged foods and about 50% of people change their minds about buying products because of

⁷⁸ Rosanna Mentzer Morrison, Lisa Mancino, & Jayachandran N. Variyam, *Will Calorie Labeling in Restaurants Make a Difference?*, AMBER WAVES: THE ECONOMICS OF FOOD, FARMING, NATURAL RESOURCES, AND RURAL AMERICA (March 2011), <http://www.ers.usda.gov/AmberWaves/March11/Features/CalorieLabeling.htm>.

⁷⁹ Bernell, *supra* note 76, at 843.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Morrison et al., *supra* note 37, at 78.

the information on the label.⁸³ The nutrition labels on packaged foods have increased consumer attention to negative ingredients like fat and sodium.⁸⁴ While consumers have improved consumption of certain nutrients like fiber and iron in the post-nutrition labeling era, it is still unclear whether label use can be associated with reduced caloric intake or saturated fat and cholesterol.⁸⁵ However, there is reason to believe that nutrition labeling in restaurants may be more promising.

Processing information on nutrition labeling in restaurants simply requires less effort on behalf of the consumer. Consumers may be more likely to pay attention to labeling in restaurants because it will provide calorie and nutritional information for the entire dish rather than individual ingredients put into an at-home meal where the consumer has to calculate the calories per serving of every ingredient to come up with nutrition information for the entire meal on his own. In addition, it has been found that when labeling effort don't disclose calories and instead highlight some healthy aspect of the food, such as the fact that it is "trans fat free," a "health halo" is created that may "further distort calorie estimates."⁸⁶ However, when customers are provided with the calorie information for those foods with "health halos," they choose the lower calorie options more often than those consumers that are deciding without the information.⁸⁷ This is compelling evidence that providing caloric information to consumers in restaurants may have a greater impact on consumer choice than traditional nutrition labels.

⁸³ Winkles, *supra* note 37, at 553.

⁸⁴ Morrison et al., *supra* note 78.

⁸⁵ *Id.*

⁸⁶ Winkles, *supra* note 37, at 560 (citing John Tierney, *Health Halo Can Hide the Calories*, N.Y. Times, (Dec. 2, 2008) (Subway restaurants provide just one example of this. A recent study gave participants the choice between a Subway sandwich and a Big Mac, which actually had fewer calories. Participants that chose the sandwich were also more likely to add a large soft drink and cookies to their orders, resulting in an average of 56% more calories than the Big Mac meal option)).

⁸⁷ *Id.* at 561.

The actual data on this hypothesis is conflicting but also limited because restaurant labeling has not been around as long as NLEA labeling and it is difficult to capture information on how people make subconscious choices. A New York University study found that “27.7 percent of New York City customers who saw calorie labeling indicated that the information influenced their choices, and about 88 percent of these customers said they purchased fewer calories in response to the labeling.”⁸⁸ Although, customers believed they were making healthier decisions, their receipts showed that they purchased the same amount of calories before and after the labeling took effect.⁸⁹

A Stanford University study found different results. Those researchers compared Starbucks sales in New York City (both before and after mandatory calorie labeling) with sales in Boston and Philadelphia where there were never any calorie postings. They found that when there were calorie postings there was an average six percent decrease in calorie consumption per transaction.⁹⁰ Interestingly, the study found that the decrease was related to food purchases and not beverages.⁹¹ Apparently, people are unwilling to sacrifice their caffeine fixes in order to decrease calorie consumption. Another study by Magat and Viscusi reported that five consumer decisions can be affected by disclosing nutrient information: (1) whether to eat out at all, (2) which restaurant to dine in, (3) which item on the menu to order, (4) whether to order additional items, and (5) which choices to make in the future.⁹² Their study found that consumer choices may be skewed by lack of information and the skewed information can lead to

⁸⁸ Morrison et al., *supra* note 78.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Winkles, *supra* note 37, at 558 (citing Wesley A. Magat & W. Kip Viscusi, INFORMATIONAL APPROACHES TO REGULATION 87 (1992)).

overconsumption.⁹³

Forcing restaurants to disclose caloric information may have positive effects apart from influencing consumer choice. Restaurants may reformulate their menus to reduce calories and make their dishes more attractive. They have already gone down this path to comply with the trans fat bans that are popping up around the country. The New York City Health Department estimates that after implementation of its restaurant menu labeling laws there have been ten percent reductions in the calorie content of food menu items.⁹⁴ Restaurants may also decrease portion sizes in order to honestly report fewer calories per meal. This will help reduce overall intake of calories but without a proportionate reduction in price, this change would likely anger customers. So in order to comply with calorie labeling regulations, restaurants may find it in their self-interest to rework their entire menus in order to give their food more health appeal and keep their customers happy. Surveys indicate that consumers want restaurant menu labeling. Approximately two-thirds of American adults want the government to require restaurants to post nutrition information on their menus.⁹⁵

B. Legislative History of Restaurant Menu Labeling Laws

The FDA's authority to regulate food products comes from the 1938 Food, Drug and Cosmetic Act ("FDCA").⁹⁶ As previously noted, the Nutrition Labeling and Education Act of 1990 amended the FDCA to establish the "Nutrition Facts" bar on most packaged food and products that make voluntary nutritional claims like "Low Fat."⁹⁷ However, the NLEA leaves

⁹³ *Id.*

⁹⁴ Michelle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience*, 65 Food & Drug L.J. 901, 913-14 (2010).

⁹⁵ Bernell, *supra* note 76, at 845.

⁹⁶ 21 U.S.C. Chapter 9 FOOD, DRUG AND COSMETIC ACT (1938).

⁹⁷ Winkles, *supra* note 37, at 553.

restaurants free to serve the food they prepare without providing any nutrition information to their customers. Given that an increased number of meals are eaten outside the home and the potential for consumers to underestimate the nutritional value of those foods, Congress has recently proposed legislation to fill the gaps left after the NLEA. However, frustrated local jurisdictions all over the country were left to address menu labeling on their own in the interim. Many of those efforts have ultimately been successful in the end but were initially met with a great deal of resistance from the restaurant industry.

1. Regional Attempts to Fill Gaps Left After the NLEA

a) New York City

In September of 2006, New York City was the first jurisdiction to propose a menu labeling law.⁹⁸ The city's action came after the realization that obesity and diabetes were the only widespread health problems in the city that were not improving.⁹⁹ Excess consumption of calories leads to weight gain and since people consume more calories when they eat outside the home, whether in fast-food chains or sit-down restaurants, the city chose to target restaurants with its regulatory measures.¹⁰⁰ As stated previously, the city saw a "calorie information gap" and decided it needed to be addressed with regulation.¹⁰¹ The city claimed that the pre-existing forms of nutritional information being provided by restaurants were not enough.¹⁰² In 2006, when the law was proposed, the majority of chain restaurants that provided nutrition information

⁹⁸ Bernell, *supra* note 76, at 839.

⁹⁹ *Id.* at 841.

¹⁰⁰ *See Id.* at 841-43; *see also* DEPT. OF HEALTH & MENTAL HYGIENE, NOTICE OF INTENTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE (2007), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-intention-hc-art81-50-1007.pdf>. The city made several findings of fact on the correlation between obesity, calorie consumption and fast food chains before proposing the legislation in its initial form.

¹⁰¹ Bernell, *supra* note 76, at 843.

¹⁰² *Id.*

voluntarily still did not provide it at the point of purchase.¹⁰³ Customers were required to request the information in pamphlet form or find it on websites before entering the establishment. There was also no way for a customer to know if the restaurant provided the information. Even when the information was available, only 3.1% of New York customers surveyed at those chain restaurants reported that they noticed the information was available.¹⁰⁴ For many people not knowing might provide enough reason not to ask. Since the majority of restaurants did not provide the information, most would avoid the question.

The city decided to use regulation to target chain restaurants because they have the highest traffic, are highly associated with obesity, and have the most standardized menus making them more amenable to accurate calorie measurements.¹⁰⁵ The city's initial rule, Regulation 81.50, focused on calorie posting for any restaurant that voluntarily made calorie information available to customers because the assumption was that generally, only chain restaurants provided the information.¹⁰⁶ With a regulation that reached chain establishments with voluntary disclosures, the city thought it could have its cake and eat it too. The restaurants could not be upset because they were already providing the information and the city would cover the highest level of restaurant traffic through the chains.

Unfortunately, the regulation was struck down in federal court after the New York State Restaurant Association ("NYSRA") filed suit against the city.¹⁰⁷ NYSRA challenged the regulation on two grounds: (1) "that Regulation 81.50 was preempted by the Nutrition Labeling and Education Act of 1990" and (2) that the regulation violated the restaurants' First Amendment

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 845.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 848; *see* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F.Supp.2d 351 (S.D.N.Y. 2007) for the court's full opinion.

rights.¹⁰⁸ The court did not address the First Amendment issue in the case because it invalidated the regulation on preemption grounds.¹⁰⁹ This left the question open for future litigation. Because the NLEA provides an exception for restaurant food, there would be no preemption issue if the city regulated labeling by all restaurants.¹¹⁰ However, the NLEA does require that any establishment that voluntarily discloses calorie information must comply with the FDA regulations. Thus, federal law preempts local regulation that is applied only to those establishments that provide calorie information voluntarily.¹¹¹ The court was explicit about striking the regulation down on very narrow grounds and even went as far to as to declare an alternative method for drafting menu labeling law that would likely be upheld: “a blanket mandatory duty on all restaurants meeting a standard definition.”¹¹²

After the first Regulation 81.50 was struck down in federal court, the city quickly put together a new Regulation 81.50 that was more likely to withstand challenges brought by the NYRSA. The biggest change made in drafting the new law was that it applied to “any food service establishment that was one of at least fifteen locations doing business nationally under the same name while offering substantially the same menu items.”¹¹³ The new Regulation 81.50 did not have the voluntary provision that the district court found conflicted with the federal labeling regulations and as a result was preempted.¹¹⁴ The reformulated regulation also added new provisions that addressed issues that were not part of the initial Regulation 81.50. The new regulation had a single flexible standard that all covered restaurants had to abide by rather than

¹⁰⁸ Bernell, *supra* note 76, at 848-49.

¹⁰⁹ N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health (*NYRSA I*), 509 F.Supp.2d 351, 361-63 (S.D.N.Y. 2007).

¹¹⁰ Bernell, *supra* note 76, at 850.

¹¹¹ *Id.*

¹¹² *Id.* at 852.

¹¹³ *Id.*

¹¹⁴ *Id.*

allowing for restaurant specific alternatives as did the first formulation.¹¹⁵ Calorie information would now have to be displayed as clearly as the menu item's name or price and be clearly associated with the item rather than adjacent to the item as in the previous regulation.¹¹⁶ The new 81.50 also required restaurants to calculate calorie ranges for combination meals in addition to individual items as required by the first regulation.¹¹⁷ The new law would cover around 10% of all food service establishments in the city, which the city estimated actually accounted for more than one-third of restaurant traffic and would impact anywhere from 145 to 500 million meals per year.¹¹⁸

Despite the changes, the new Regulation 81.50 was still met with the same legal challenges as the first: (1) that the calorie posting requirement was a nutritional “claim” under the NLEA and therefore subject to federal regulations that would preempt the local law and (2) that the regulation violated the restaurants’ First Amendment rights.¹¹⁹ This time the city won and in April 2008, the district court found in its favor.¹²⁰ The case went before the same judge as the challenge to the first Regulation 81.50. He concluded that the first ruling on preemption was limited to the “voluntary nature of the original Regulation 81.50” and that the mandatory disclosure requirement of the new Regulation 81.50 would “likely not be preempted by the NLEA.”¹²¹ The court reasoned that a purely factual disclosure “such as ‘100 calories,’” is only considered a “claim” under NLEA when it is voluntarily made rather than compelled as it would

¹¹⁵ *Id.* at 853.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 854.

¹²⁰ *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 545 F. Supp. 2d 363 (2008).

¹²¹ *Bernell*, *supra* note 76, at 855.

be under the new regulation.¹²² Because the NLEA explicitly allows for states to regulate nutritional information for all restaurants, the court held that the city was within its authority to create a mandatory labeling requirement.¹²³

Having ruled in favor of the defendant on the issue of preemption, the court then addressed the First Amendment claim. Knowing that commercial speech is afforded less First Amendment protection as a general matter, NYSRA instead claimed that the calorie-posting requirement was compelled speech.¹²⁴ The Association argued that restaurants were being forced to promote a message they did not agree with: “that calorie information is the only relevant nutrition criterion to consider when making food decisions.”¹²⁵ They also argued that in the alternative, Regulation 81.50 should be subject to an intermediate standard of review as a restriction on commercial speech.¹²⁶ The court ultimately rejected both of the NYSRA’s claims. The court found that Regulation 81.50 required a purely factual disclosure and that a mandatory disclosure of ‘factual and uncontroversial’ information is not the same for First Amendment purposes as the compelled endorsement of a viewpoint.¹²⁷ The regulation did not require that any statements be made about the value of the information, only that the information be provided to consumers. The court rejected the intermediate scrutiny argument as well and instead subjected the regulation to a “reasonable relationship” analysis.¹²⁸ The court held that the regulation would not violate the First Amendment as long as there was a reasonable relationship between the

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 855-56.

¹²⁶ *Id.* at 856.

¹²⁷ *Id.*

¹²⁸ *Id.* at 857.

disclosure requirement and the city's interest in reducing obesity.¹²⁹ The court concluded that the city did in fact satisfy the reasonable relationship standard.¹³⁰ The NYSRA appealed to the Second Circuit, which ultimately affirmed the district court's decision.¹³¹

Now that the Second Circuit has affirmed the use of menu labeling laws to supplement the regulations of the NLEA, there is precedent for other jurisdictions to move forward with similar regulations. New York has served as a sort of bellwether case for the country and provided the framework for a working system that can help combat obesity by targeting the consumer decision-making process where it matters most. As long as regulations maintain a reasonable relationship to the government's interest in curbing obesity, they should continue to be declared a constitutional means of dealing with the problem.

b) California

California provides an interesting case study because after proliferation of local menu labeling laws throughout the state, legislators decided to preempt all of those local schemes and instead adopt a statewide regulatory system to provide uniformity for the benefit of both consumers and restaurants. Before California adopted its statewide legislation, several cities and counties had either passed menu-labeling laws or had them pending in local legislatures.¹³² In San Francisco City and County, restaurants with twenty or more locations in the state were required to post nutrition information on their menus.¹³³ Restaurants did not have to post

¹²⁹ *Id.*

¹³⁰ *See Id.* at 857-58. The court noted that, "while conclusive proof was elusive, based on the evidence in existence, 'it seems reasonable to expect that some consumers will use the information... to select lower calorie meals when eating... and that these choices will lead to a lower incidence of obesity.'"

¹³¹ *Id.* at 859-61.

¹³² Ashley Arthur, *Combating Obesity: Our Country's Need for a National Standard to Replace the Growing Patchwork of Local Menu Labeling Laws*, 7 Ind. Health L. Rev. 305, 316 (2010).

¹³³ *Id.*

information for items such as condiments, alcoholic beverages or items on the menu for less than thirty days.¹³⁴ San Francisco chains were also required to report their nutrition information to the Department of Health on an annual basis.¹³⁵ Santa Clara County required that restaurants with fourteen or more in-state locations post nutrition information on their menus.¹³⁶ Santa Clara adopted the same exceptions as San Francisco but did not require that nutrition information be reported to the Department of Health.¹³⁷ The differences in these regulations were often minor but restaurants had to figure out how to apply them and what exceptions to apply from city to city throughout the very large state of California.

The Californian restaurant industry put pressure on the legislature to provide a more uniform law and in January 2007, they succeeded. SB 120 was proposed and made it successfully through both chambers of the legislature.¹³⁸ SB 120 would have applied to restaurants with fifteen or more national chains (rather than in-state) with standardized menu items only and exceptions for daily specials and custom orders making it much broader than the local laws noted previously.¹³⁹ SB 120 also excluded items on offered on the restaurant's menu for less than six months, condiments, items on counters or tables for general use and alcoholic beverages.¹⁴⁰ Unfortunately, SB 120 did not gather enough support and the bill was vetoed in October 2007.¹⁴¹

One year later, in October 2008, Governor Schwarzenegger signed SB 1420, California's

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Arthur, *supra* note 132, at 316-17.

¹⁴⁰ *Id.* at 317.

¹⁴¹ *Id.*

statewide menu labeling law.¹⁴² California's state-wide law was the first of its kind. The California Restaurant Association supported the legislation because it standardized requirements and preempted the multitude of local ordinances throughout the state.¹⁴³ Public opinion polls demonstrate that eighty-four percent of Californians also supported the bill.¹⁴⁴ SB 1420 was implemented in two phases. The first required that brochures with nutritional information be placed at the point of purchase and the second required that restaurants list calories on menus and menu boards next to each menu item by January 1, 2011.¹⁴⁵ The legislation also contains provisions that preempt cities from enacting competing menu labeling laws.¹⁴⁶

SB 1420 provided fuel for restaurant associations across the country to lobby Congress for a national menu labeling law. The National Council of Restaurant Chains ("NCCR"), for example, applauded California for its efforts but also said that statewide standards are not enough and urged that a national standard would "provide even more clarity, consistency, and flexibility for restaurants."¹⁴⁷ Restaurants with national chains still have to worry about keeping track of the nuances that exist in labeling laws in various states across the country.

C. The Next Step in Restaurant Menu Labeling: A National Standard

Restaurants seem to have come to terms with the fact that restaurant menu labeling is only getting more popular and rather than challenge the regulations in individual jurisdictions, they have chosen to advocate for a unified national standard.¹⁴⁸ As long as this kind of regulation is going to exist, it makes sense to have one standard for restaurant chains to apply in their

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 318.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 320.

¹⁴⁸ Bernell, *supra* note 76, at 865.

locations across the country. Public interest groups like the Coalition for Responsible Nutrition Information (“CRNI”) have also pushed for flexible federal legislation to address the lack of nutrition information given to consumers.¹⁴⁹ According to statistics from the International Franchising Association, “56.3% of quick service restaurant establishments and 13.3% of table service restaurant establishments in the United States are franchises.”¹⁵⁰ The fact that so many restaurants are franchised provides more reason for uniform standards. As the likelihood that restaurant chains will operate in multiple jurisdictions increases so does the burden on the restaurants to keep up with multiple regulatory systems. Keeping up with several different labeling schemes may also become costly for restaurants. Indirect costs like packaging, serving sizes, different products and printing multiple menus will eliminate economies of scale that large chains and ultimately consumers who want food for low prices benefit from.¹⁵¹ It is doubtful that restaurants will just absorb these costs. The more likely outcome would be for them to shift the burden to consumers by increasing food prices or shift the burden to their own employees by reducing wages where possible. Thus, there seem to be a lot of reasons why everyone could benefit from a nationalized standard.

Several proposals to provide a national standard have been presented to Congress.¹⁵² For example, the CRNI proposed that the national standard come from an expansion of the NLEA¹⁵³ while others have pushed for entirely new legislation. In 2003, the Menu Labeling and Education Act (MEAL) was proposed in the House by Representative Rosa Delauro.¹⁵⁴ The MEAL Act was meant to expand the NLEA “to enable customers to make informed choices about the

¹⁴⁹ Arthur, *supra* note 132, at 312.

¹⁵⁰ Winkles, *supra* note 37, at 572.

¹⁵¹ *Id.* at 573.

¹⁵² Bernell, *supra* note 76, at 865.

¹⁵³ Arthur, *supra* note 132, at 312.

¹⁵⁴ Banker, *supra* note 94, at 904.

nutritional content of standard menu items in large chain restaurants.”¹⁵⁵ Representative Delauro even issued a press release explicitly describing the MEAL Act as closing the loophole left by the NLEA.¹⁵⁶ The Meal Act was reintroduced in every subsequent Congress but was never made law.¹⁵⁷

In September 2008, the Labeling Education and Nutrition Act (“LEAN Act”) was introduced in the House.¹⁵⁸ It also struggled and was reintroduced without success until 2010.¹⁵⁹ The LEAN Act became the national standard in March 2010 when the Patient Protection and Affordable Care Act was signed into law.¹⁶⁰ Section 4205 of the Health Care Act amends the FDCA to include a menu labeling provision: the Lean Act. The law covers all restaurants that have twenty or more locations operating under the same name with substantially the same menu items.¹⁶¹ The law also requires that applicable restaurants post calorie information adjacent to the menu item and calls for a “succinct statement concerning suggested daily caloric intake” somewhere on the menu.¹⁶² Section 4205 builds onto the New York scheme by also adding a requirement that supplementary nutrition information be available upon request by the consumer.¹⁶³ Several items are exempt from the new law including: temporary items that are on the menu for less than sixty days, foods being market tested for less than ninety days, and items that are not listed on the menu such as condiments.¹⁶⁴ The law goes even further in the interest of public health and extends its scope to vending machines. Caloric postings will be required for

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Arthur, *supra* note 132, at 322.

¹⁵⁹ Banker, *supra* note 94, at 905.

¹⁶⁰ Bernell, *supra* note 76, at 865.

¹⁶¹ § 4205(b), 2010 Health Care Act.

¹⁶² § 4205(b), 2010 Health Care Act.

¹⁶³ § 4205(b), 2010 Health Care Act.

¹⁶⁴ Bernell, *supra* note 76, at 865.

items that do not have visible nutritional information in machines that are owned or operated by an entity that has twenty or more machines.¹⁶⁵ The law still leaves open the possibility for local laws to apply to those restaurants and vending machines that are not part of a nationwide chain of twenty or more. Those businesses can voluntarily submit to the federal scheme by registering with the Secretary of Health and Human Services and avoid local regulations that are not preempted.¹⁶⁶

Both public interest groups and restaurant associations have supported the new law.¹⁶⁷ Restaurants and other groups have even said that the law is not broad enough. They advocate for a regulation that would apply to all restaurants or at least those that meet a certain minimum amount of annual sales.¹⁶⁸ Still others have proposed that the regulations should apply to restaurants with chains of three or more.¹⁶⁹ The idea behind their proposal is that more, rather than fewer, restaurants should be subject to menu labeling because only requiring chains to post their caloric information puts those restaurants at a competitive disadvantage as compared to those establishments that are not covered by regulations.¹⁷⁰ As history shows, federal legislation can be quite slow moving. Advocates of more regulation for more restaurants may find more success in petitioning local governments that can still act on areas that would not be preempted by federal legislation.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* It remains unclear what will happen where the local law is broader than the federal law. For example, New York City's menu labeling law applies to restaurants with fifteen or more chains while the federal law applies to chains of twenty or more. It is unclear what whether the local law will be preempted as to those chains with between fifteen and twenty locations.

¹⁶⁷ *Id.* at 866.

¹⁶⁸ *Id.* at 866-67.

¹⁶⁹ *Id.*

¹⁷⁰ Tamara Schulman, *Menu Labeling: Knowledge for a Healthier America*, 47 Harv. J. on Legis. 587, 606 (2010).

IV. EDUCATION AS A WEAPON AGAINST OBESITY

A. Educating America's Youth

The government rarely has the power to actually control what people choose to eat. The opportunity to control what adults eat only comes when they are in prison. However, in the case of children, the government has a tremendous opportunity to shape the way that children think about food and control a large part of their daily diet. The National School Lunch Program (“NSLP”) serves twenty-nine million children every day and costs taxpayers more than \$7 billion dollars per year.¹⁷¹ Those meals are supposed to be nutritious. When the program was enacted in 1946, its stated purpose was to “safeguard the health and well-being of the Nation’s children.”¹⁷² However, it is hard to say that school lunches actually provide children and young adults with healthy meals.

A 1993 report from the U.S. Department of Agriculture found that school lunches tended to exceed the national recommendations for fat, saturated fat, and cholesterol.¹⁷³ Later studies found that the same was true of meals offered in the NSLP and the National School Breakfast Program.¹⁷⁴ In most schools, the state’s lunch is not the only purchase option. Virtually all schools sell competitive food alternatives to the NSLP options.¹⁷⁵ Competitive foods add sugar, fat and empty calories to students’ diets and they also create a school environment that is heavily

¹⁷¹ Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 Duke L.J. 1491, 1492 (2007).

¹⁷² *Id.* at 1502.

¹⁷³ St.-Onge, Keller, & Heymsfield, *supra* note 2, at 1069-70.

¹⁷⁴ *Id.* at 1069 38% of the energy in those lunches came from fat and 15% from saturated fat when current recommendations say less than 30% of energy should come from fat and less than 10% should come from saturated fat in every meal. Sodium content of the lunches was also high and already at levels of more than half the daily recommended amount.

¹⁷⁵ Fried & Simon, *supra* note 171, at 1494.

influenced by commercialism and marketing.¹⁷⁶ The USDA has shown concern over competitive foods and stated that they are “substantially less healthy than USDA-approved foods served through the NSLP.”¹⁷⁷ Many schools offer a la carte food items and have student stores offering even more unhealthy options for students to purchase, often with money meant for NLSP lunches. The fourth option is for students to pack a lunch from home. When the nutritional values of these options were compared, it was found that standard school lunches contained approximately 31.1 total grams of fat, bag lunches (those brought from home) contained approximately 20.8 total grams of fat.¹⁷⁸ A la carte and student store items contained an average 13.1 and 6.4 grams of fat per item respectively.¹⁷⁹ However, those numbers may be deceiving since students rarely eat only one of these items per meal. If bag lunches are representative of all food consumed at home, it would appear that school lunches add to the problem of overconsumption and energy intake rather than the solution.

A sampling of middle schools in San Diego County, California found that fresh fruit and vegetables were not available in student stores.¹⁸⁰ The simplest solution to this problem would be to offer healthier options in the student stores. Evidence also shows that how the items are priced

¹⁷⁶ *Id.* at 1497.

¹⁷⁷ Kathryn L. Plemmons, *The National School Lunch Program and USDA Dietary Guidelines: Is There Room for Reconciliation*, 33 J.L. & Educ. 181, 193 (2004). The USDA itself has faced harsh criticism over the standard that it uses in determining what products can be used in the NSLP. See Peter Eisler, Blake Morrison, & Anthony DeBarrios, Fast-Food Standards for Meat Top Those For School Lunches, USA TODAY (Dec. 9, 2009, 8:31 AM), http://www.usatoday.com/news/education/2009-12-08-school-lunch-standards_N.htm (stating that fast food restaurants test the beef they purchase five to ten times more often than the USDA tests beef made for schools during a typical production day and that limits for bacteria are higher for school lunches than they are for fast food chains).

¹⁷⁸ St.-Onge, Keller, & Heymsfield, *supra* note 2, at 1070.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

in these student stores will have a huge effect on the choices students make.¹⁸¹ It has been found that when the price of lower-fat or healthy food items is reduced, there is an increase in purchases of these foods over their unhealthy counterparts.¹⁸² In fact, a survey of ninety high school students found that food cost ranked third among the five main reasons for selecting a food item right after personal preference/taste and custom or habit.¹⁸³ Thus, increasing the cost of unhealthy foods (perhaps through something like a junk food tax) or decreasing the cost of healthy foods in schools would probably influence students' food choices. Another option of course, would be to eliminate these foods entirely and leave students with only the ability to purchase NSLP lunches or to pack a lunch from home. However, schools that have tried to eliminate the NSLP's competition within the schools have been met with many obstacles that will be discussed below.

“As of the 2003-04 school year, 75 percent of high schools, 65 percent of middle schools, and 30 percent of elementary schools had ‘pouring rights’ contracts.”¹⁸⁴ Those contracts provide the schools with cash and other incentives in exchange for granting exclusive beverage sales rights to the beverage corporation. These beverages are rarely sugar-free or non-diet refreshments. Research has found that when a child consumes just one additional sugary beverage per day, the risk of obesity is increased by sixty percent.¹⁸⁵ Corporations benefit from these contracts because they help develop brand loyalty in students at an early age.¹⁸⁶ They also benefit from the fact that the sale of fast food brands in schools establishes “lifelong tastes and

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 1071.

¹⁸⁴ Fried & Simon, *supra* note 171, at 1494.

¹⁸⁵ *Id.* at 1498.

¹⁸⁶ *Id.* at 1500.

eating habits” that favor their commercial interests.¹⁸⁷ American children are being indoctrinated from a very early age by these companies and it is happening in an environment that is supposed to be pursuing their best interest.

Given the historical lack of federal regulation in this area, schools have fallen victim to the food industry. Schools with limited state funding find themselves almost compelled to enter into “pouring contracts” in order to pay for team uniforms, score boards and other equipment. Some find the level of influence that the food industry enjoys in schools unacceptable and they propose that, “a complete ban on all competitive foods, in all grades, at all times” would be the ultimate solution.¹⁸⁸ The more recent interest the government has taken in the area has been economically motivated. One bill to restrict the sale of non NSLP items offered in its support that, “as children consume more and more of the foods typically sold through school vending machines and snack bars, it undermines the nearly \$10 billion in Federal reimbursements that we spend on nutritionally balanced school meals.”¹⁸⁹ There is some evidence that if competitive items were eliminated students would eat the NSLP lunches provided. In fact, in states where the sale of competitive foods has been restricted, NSLP participation has exceeded the national average.¹⁹⁰

However, eliminating non-NSLP items from schools entirely will not solve the nutritional problem on its own. As demonstrated above, a lot of work needs to be done to bring the NSLP menu up to today’s nutritional standards. Doing so would of course require that the federal reimbursement rate increase so that schools can reduce their dependency on high-fat, low-

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1497.

¹⁸⁹ *Id.* at 1501.

¹⁹⁰ *Id.*

nutrient, commodity foods.¹⁹¹ Of course, it would only be a good thing for more children to participate in NSLP if those meals actually provide healthy alternatives to what children are eating now.

On January 13, 2011, the USDA published a proposed rule to update the nutrition standards for meals served in the NSLP and the School Breakfast program as part of the Healthy, Hunger-Free Kids Act of 2010.¹⁹² The proposition seeks to raise the meal standards for the first time in fifteen years.¹⁹³ The Act could increase the federal reimbursement by six cents per meal and provide schools with new tools to meet the challenge of providing a truly healthy school lunch.¹⁹⁴ The hope is that if schools receive more funds through federal reimbursements for the NSLP program, they will be able to say no to more companies when approached for pouring rights contracts. The USDA was seeking input on the proposed rule in April of 2011. Only time will tell whether, if passed, it will actually make a difference for future generations of children that eat NSLP lunches everyday.

B. Educating the Greater Community

1. Public Programs

Given the political cost of increasing taxes to fund programs that many citizens find paternalistic and intrusive, most state efforts to educate people about healthy diets and obesity prevention are low budget.¹⁹⁵ In addition to the restaurant menu labeling efforts discussed above, states have started educational programs aimed at helping their citizens make healthy decisions.

¹⁹¹ *Id.* at 1538.

¹⁹² Press Release, U.S. DEPT. OF AGRIC., USDA UNVEILS CRITICAL UPGRADES TO NUTRITIONAL STANDARDS FOR SCHOOL MEALS (Jan. 13, 2011) *available at* <http://www.fns.usda.gov/cga/PressReleases/2011/0010.htm>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Baker, *supra* note 20, at 192.

Many of these programs start with elementary school children. Philadelphia has adopted the “Comprehensive School Nutrition Policy Initiative.” In 2003, The Food Trust developed the policy to help young people “attain their full educational potential and good health by providing them with the skills, social support and environmental enforcement needed to adopt long-term healthy eating habits.”¹⁹⁶ The program includes: nutrition education in schools, school lunches that meet healthy food requirements, teachers that are equipped to incorporate nutrition education in their curriculum, family involvement, and ongoing program evaluations and adjustments.¹⁹⁷ It seems that Philadelphia’s efforts have been successful. The program was evaluated by Dr. Gary Foster who found that the initiative actually reduced the incidence of childhood overweight by 50%.¹⁹⁸ While programs aimed at children have found some success, adults are harder to re-educate because they need to overcome the large hurdle of already being overweight, needing to lose that weight and maintaining a healthy lifestyle after years of making unhealthy choices.

A wide variety of programs have been targeted at adult consumer choice. These wellness programs include things like offering Internet-based resources for information about eating right, exercising and other healthy behaviors.¹⁹⁹ Local governments also offer community programs and events with wellness themes, smoking cessation initiatives, and even awards for citizens that

¹⁹⁶ *Comprehensive School Nutrition Policy Initiative*, THEFOODTRUST.ORG, <http://www.thefoodtrust.org/php/programs/comp.school.nutrition.php>.

¹⁹⁷ *Id.*; see Power Point Presentation: COMPREHENSIVE SCHOOL NUTRITION POLICY FOR THE SCHOOL DISTRICT OF PHILADELPHIA, available at <http://www.thefoodtrust.org/php/programs/comp.school.nutrition.php>.

¹⁹⁸ See Gary D. Foster et al., *A Policy-Based School Intervention to Prevent Overweight and Obesity*, 121 J. Pediatrics 794 (2007) available at <http://www.pediatrics.org/cgi/content/full/121/4/e794>.

¹⁹⁹ Baker, *supra* note 20, at 192.

participate in their programs and events.²⁰⁰ All of these programs are aimed at helping consumers make healthier choices in their everyday lives. Community design efforts have also been proposed as a more viable solution to the obesity epidemic than junk food taxes or out-right bans. Some of those programs include improving local zoning laws to accommodate bike trails and sidewalks to motivate people to walk and get more exercise.²⁰¹ New Jersey is a good example of one of these programs. They passed the Health Enterprise Zone Act in 2004.²⁰² The Act allows the commissioner of health to identify the areas most in need of health care services. Those health care providers that move to what the Act identifies as “Health Enterprise Zones” can take advantage of incentives like reduced tax liability and the opportunity to apply for low interest loans.²⁰³ With more access to healthcare, consumers can be made aware of the effects that being overweight or obese may already be having on their health. Indeed, for many people their excess weight does not become a cause for concern until they discover that they suffer from high blood pressure, high cholesterol or in the most far-gone cases, diabetes.

Pennsylvania and New Mexico have also adopted community design efforts with the aim of increasing access to healthy foods and reducing the presence of food deserts in their jurisdictions.²⁰⁴ Pennsylvania’s Fresh Food Financing Initiative (2004) has produced more than one million square feet of retail food space in urban food deserts across the state.²⁰⁵ As noted previously, with more large grocery chains near their homes, people can purchase healthy foods at more reasonable prices than they would in local convenience stores. New Mexico’s program is in the earlier stages of development and primarily focused on providing loans to small grocery

²⁰⁰ *Id.*

²⁰¹ *Id.* at 194.

²⁰² *See* New Jersey Health Enterprise Zone Act, 2004 N.J. Laws Ch. 139.

²⁰³ Baker, *supra* note 20, at 194-95.

²⁰⁴ *Id.* at 195.

²⁰⁵ *Id.*

store owners so that they can install loading docks and purchase produce coolers so that they can receive shipments from large distributors and provide healthier options for consumers.²⁰⁶ Still other state programs provide training and technical assistance for storeowners new to the business of produce.²⁰⁷ The programs also offer financial incentives to food stamp recipients to encourage them to buy fresh fruits and vegetables and still others provide tax incentives to farmers that offer their produce at farmers' markets in food deserts.²⁰⁸

Still more aggressive jurisdictions have attempted to use zoning laws to curb the obesity epidemic in their areas. Rather than bringing healthy food in, these measures are aimed at keeping unhealthy food out to allow healthy substitutes to take over naturally. In 2008, communities in South Los Angeles became subject to a one-year moratorium on the establishment of new fast food restaurants in the area.²⁰⁹ The ordinance defines a "fast food restaurant" as "an establishment that serves food for eat-in or take-out, and which has 'a limited menu, items prepared in advance or prepared or heated quickly, no table orders, and food served in disposable wrapping or containers.'"²¹⁰ The city council has the ability to extend the temporary moratorium for two additional six-month periods if the city is pursuing permanent regulations.²¹¹

The City of San Jose considered similar regulations based on the same concerns over rapidly growing obesity rates and increased availability of foods high in fat and low in nutrition.²¹² Unfortunately, the City's Rules and Open Government Committee voted against the

²⁰⁶ *Id.* at 196.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Rodriguez-Dod, *supra* note 1, at 717.

²¹⁰ *Id.* at 718.

²¹¹ *Id.*

²¹² *Id.* at 718-19.

ban because it did not believe such a ban could be the solution to obesity prevention.²¹³ More time may be needed to assess whether the South Los Angeles has any effect on rates of obesity in the area but it seems promising. It seems the regulation is aimed at reversing the situation that exists in the case of food deserts by making fast food more difficult for consumers to access. Although, as the San Jose example demonstrates, getting people to accept it as a means of curbing obesity may be the real hurdle.

2. Private Efforts: Corporations Helping Employees Get Healthy

Private actors have also realized the need for intervention in the realm of health and wellness. Many corporations, independent of government incentives to do so, provide many several health and wellness benefits to their employees and their families. Recent research has shown that more than half of all large American companies offer “some combination of benefits such as nutrition education, weight management assistance, health risk assessments, and help quitting smoking.”²¹⁴ More than a quarter of companies offer things like fitness coaching and discounts on health club memberships.²¹⁵ At least some business interests are in line with public interests. Of course not all these measures are entirely philanthropic. In many cases, the government offers tax incentives for businesses to offer these services to their employees. Perhaps more generous tax breaks for things like in-house fitness facilities can help make it more convenient for people to get in their daily exercise routines and burn off some of the excess calories that they are consuming.

²¹³ *Id.* at 719.

²¹⁴ Baker, *supra* note 20, at 191.

²¹⁵ *Id.*

3. Foreign Approaches to Health and Wellness Education

Foreign jurisdictions and companies have adopted even more drastic regulations and programs. In 2008, Japan enacted a law requiring companies and local governments to monitor the waist size of Japanese aged forty to seventy-four during their annual checkups or suffer financial penalties.²¹⁶ Those with waist sizes greater than the recommended size limit (33.5 inches for men and 35.5 inches for women) who also suffer from an illness related to obesity are given dieting guidance and re-educated as to their eating habits if their waist size does not shrink in six months of the initial examination.²¹⁷ The Japanese government's aim is to curb the rising costs of healthcare with the stated goal of reducing obesity by ten percent in the first four years after the law's enactment and twenty-five percent over the next seven.²¹⁸ Companies are required to meet certain health targets or pay financial penalties to the government.²¹⁹ The Japanese model has met harsh criticism at home and abroad. Many believe that the goals of the program are too unrealistic.²²⁰ Japan has continued with its program in spite of these criticisms hoping to reduce the "waist lines and health care costs of its aging population."²²¹ It is doubtful that such strict programs could ever be implemented in the United States because of the high-value American culture places on free choice. The fact that Japanese culture values the community over the individual may explain why the citizens of Japan would accept efforts that would seem intrusive to the average American.

²¹⁶ Rodriguez-Dod, *supra* note 1, at 716. Although BMI is one of the most widely accepted means of measuring obesity, studies have indicated that waist size is a better indicator of propensity for hypertension, diabetes, and high cholesterol.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See Id.*

²²¹ *Id.*

V. EFFORTS TO MAKE UNHEALTHY FOODS LESS ATTRACTIVE

A. Junk Food Tax

We have already seen how the government has tried to influence purchasing decisions in restaurants by providing information. However, it is also true that the NLEA has not been as effective in actually altering consumer choice. It seems clear that more needs to be done to change the way consumers decide what pre-packaged foods to purchase. Most state governments have chosen to discourage the consumption of unhealthy foods and snacks by imposing taxes on them.²²² If the nutrition information is not having enough of an effect, perhaps money will. Legislators have chosen to use their power of taxation against high-sugar products like soda and foods with low nutrient content like potato chips.²²³ In addition to discouraging consumption of these foods, the tax provides revenue that can be used to support programs targeting public health like “state health programs, additional health inspections, or state contributions to medical, dental, and nursing schools.”²²⁴ Although, there is a lot of need for programs to educate people about healthy diet choices, those programs are not well funded. For example, the National Cancer Institute operates on an annual budget of one million dollars while the restaurant industry spends more than three billion dollars on advertising in the same period.²²⁵ Junk food taxes are seen as a means of leveling the playing field. Unfortunately, the positive effects that the revenues generated by junk food taxes don’t begin to compare to the economic costs of diet-related diseases. Conservative estimates put the national cost of those diseases at around \$71 billion

²²² Keyana Farkondepay, “*Junk Food Tax*” *Gains Support*, AMERICAN OBSERVER (Nov. 1, 2009), <http://inews6.americanobserver.net/articles/junk-food-tax-gains-support>.

²²³ *Id.*

²²⁴ Baker, *supra* note 20, at 190.

²²⁵ Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 Am. J. Public Health 854, 854 (2000).

annually²²⁶ and not all states use the money for programs created to decrease obesity.²²⁷ A 2009 poll found that 63% of people who oppose current junk food taxes would support them if the revenue went to programs created to decrease obesity.²²⁸ Virginia, for example, puts the revenue generated into the state's general fund.²²⁹ Those who oppose the tax on junk food are offended because they feel that the fact that the money goes to a general fund rather than one targeted at health minded programs means that obesity is just a pretext for collecting even more tax revenues from hard working people without giving them any benefit in return.

Not only is there push back from consumers who are against the taxes, corporations have also lobbied heavily against the taxes. At least nine states have recently repealed their taxes on junk food.²³⁰ Soft-drink companies and snack food corporations threats to move their manufacturing facilities out of junk-food-tax-imposing states were largely responsible for those repeals.²³¹ The investment that corporations make in state government, along with the jobs, income and wealth they bring with them give them a great deal of influence over legislators.²³² Faced with a choice between revenue and jobs for their constituents versus providing obesity prevention programs, legislators will almost always choose the former. Capture is a serious problem when it comes to regulating against obesity. In Ohio, for example, bottling companies launched a successful seven million dollar advertising campaign funded by the soft drink industry to defeat the \$0.008 per ounce tax on carbonated beverages.²³³ Commercials paid for by soft drink companies have a much greater effect on people than press releases made by local

²²⁶ Baker, *supra* note 20, at 190.

²²⁷ Farkondepay, *supra* note 222.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Baker, *supra* note 20, at 191.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

legislators in more low-budget media like websites or newspapers. The message that people hear is that the government wants to increase taxes on their favorite snack foods and not the message that the government is trying to help people lead healthier lives.

The fact that junk food taxes have had only limited success in staying in effect is unfortunate because there is evidence that they can help. Research has found that a twenty percent tax on caloric sweetened beverages can reduce consumption, overall calorie intake and body weight even after accounting for increased consumption of alternative beverages.²³⁴ However, in order to work it seems that consumers need to be aware that they will be taxed on unhealthy items.²³⁵ The best way to avoid that problem would be for the tax to be included in the price consumers see on the shelves rather than asking that they be aware of the taxes and consider that they will be added at checkout.²³⁶ The same principle motivating the tax, that money influences people's choices, is also the one that hinders its success. Corporations have the money to run ad campaigns and lobby against junk food taxes and capture not only legislators but citizens as well.

B. Restrictions Advertising Opportunities for Unhealthy Foods

1. Advertising Campaigns Targeting Children

As just noted, large corporations have enormous amounts of money to spend on advertising in order to affect consumer decision making. As early as the 1970s, it was obvious that these corporations were targeting children to push their products. The Federal Trade

²³⁴ Travis A. Smith, Biing-Hwan Lin, & Rosanna Mentzer Morrison, *Taxing Caloric Sweetened Beverages To Curb Obesity*, AMBER WAVES: THE ECONOMICS OF FOOD, FARMING, NATURAL RESOURCES, AND RURAL AMERICA (Sept. 2010), [http:// www.ers.usda.gov/AmberWaves/September10/Features/TaxingCaloricBeverages.htm](http://www.ers.usda.gov/AmberWaves/September10/Features/TaxingCaloricBeverages.htm).

²³⁵ *Id.*

²³⁶ *See Id.*

Commission (“FTC”) compiled a report stating that it was unfair for advertisers to direct commercials at children and the agency issued a *Notice of Proposed Rulemaking* in 1978 that proposed major regulation of advertisements aired during children’s television.²³⁷ There was outcry after the proposition. The media admonished the FTC and called the proposal a “preposterous intervention.”²³⁸ Congress responded by passing legislation to limit the FTC’s power to enforce any rules relating to children’s advertising.²³⁹ This result was likely the product of strong lobbying efforts. The inability to regulate advertisements targeting children is a true handicap for legislators dedicated to educating consumers and influencing their behavior.²⁴⁰ Advertisements targeted at children have been identified as a major cause of childhood obesity.²⁴¹ The majority of advertisements aimed at children are for food products and in most cases those products are unhealthy.²⁴² Furthermore, studies have found that there is a relationship between the increase in advertising aimed at children and obesity rates in children.²⁴³ Studies have also found that not only do these advertisements get children to eat unhealthy foods, they also cause them to eat less of the healthy foods that they need.²⁴⁴

Since the government failed to do anything about the influence that advertising exerts over children, private parties have stepped in. Public interest groups and private citizens have used litigation to chip away at the power of the food industry to influence children and adults.

²³⁷ William A. Ramsey, *Rethinking Regulation of Advertising Aimed at Children*, 58 Fed. Comm. L.J. 361, 362 (2006).

²³⁸ *Id.* at 363.

²³⁹ *Id.*

²⁴⁰ See Fed. Trade Comm. Report: MARKETING FOOD TO CHILDREN AND ADOLESCENTS 2008 WL 2974317 (F.T.C.) (2008) (demonstrating the ubiquity of ads targeting children). The report outlines the amount of money spent to target different demographics and the methods used.

²⁴¹ Margaret Sova McCabe, *The Battle of the Bulge: Evaluating Law as a Weapon Against Obesity*, 3 J. Food L. & Pol’y 135, 141 (2007).

²⁴² Ramsey, *supra* note 237, at 368.

²⁴³ *Id.*

²⁴⁴ *Id.*

Committee on Children's Television, Inc. v. General Foods was filed in the 1970s.²⁴⁵ The plaintiffs in that case were pioneers in that they were already making claims that sugar cereal contributed to obesity, diabetes and heart disease.²⁴⁶ In 2002, *Pelman v. McDonald's Corp.* was filed.²⁴⁷ McDonald's was attacked under the New York Consumer Protection Act and like *Children's Television*, focused on advertising techniques rather than food content as the source of health problems created by eating unhealthy foods.²⁴⁸ Though lawsuits placing the blame for obesity on manufacturers of unhealthy snacks and fast food corporations have not been very successful, they have inspired companies to make changes. These changes are welcome even if they are only another public relationship ploy to win over consumers. Specifically, these corporations have preempted future suits by making product and marketing changes.²⁴⁹ Kellogg has changed the content of its website to avoid exerting excessive influence on children. Their website now includes an automatic use break feature that kicks in after fifteen minutes of screen time and healthy lifestyle messages.²⁵⁰ Others have added healthy items like ready-made salads to fast food menus and the offering the option of apple slices rather than french fries in children's meals. This once again demonstrates that when the public asks for healthier options, corporations tend to provide them.

The government can and should take measures to curb the effect that advertising has on children. Some suggest that the government should require disclosures about health information

²⁴⁵ 673 P.2d 660, 663 (Cal. 1983).

²⁴⁶ *Id.* The plaintiffs lost their case because the court could not find a fiduciary relationship between the defendants and the consumers.

²⁴⁷ 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

²⁴⁸ McCabe, *supra* note 241, at 146-47.

²⁴⁹ *Id.* at 150.

²⁵⁰ *Id.* at 152.

in the commercials.²⁵¹ This would require that the unhealthy nature of the food be revealed to the viewers in order to remove the flashy media halo around the item being advertised. Proponents also make clear that the disclaimers should be explained in language that children can understand in order to truly reduce the misleading nature of the message.²⁵² The government can also address the problem by banning the use of cartoon characters and celebrities in children's commercials. Studies show that the use of cartoon characters or celebrities increases the influence of commercials over children.²⁵³ This may be due to the fact that children recognize and retain images of cartoon characters used in advertisements. A study conducted in 1996 found that "nine and ten-year-olds were able to identify the Budweiser Frogs nearly as often as they were able to identify Bugs Bunny."²⁵⁴ A 1991 study found that six-year-olds recognize Joe Camel and the Disney logo at the same rate.²⁵⁵

Other countries have responded to this evidence of influence by banning the use of cartoons in food commercials entirely. British broadcasters have banned them with the stated aim of fighting that country's obesity problem.²⁵⁶ Other countries have taken a broader approach. Sweden has banned all advertising (for any product) aimed at children twelve and under and Norway and Finland have banned companies from sponsoring children's television programming.²⁵⁷ It seems likely that such restrictions on advertising could survive First Amendment challenges. Commercials aimed at children that use cartoon characters constitute commercial speech and are therefore afforded only limited First Amendment protection. Given

²⁵¹ Ramsey, *supra* note 237, at 384.

²⁵² *See Id.* at 386.

²⁵³ *Id.* at 387.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 364.

that prevention of childhood obesity is critical to the government's interest in combating the obesity epidemic, it is likely that the government's interest will prevail over such a minimal infringement on commercial speech. The government has taken notice of the increasing amount of research demonstrating that advertisements aimed at children are truly influencing them. They in turn influence their parents' behavior by convincing them to purchase the advertised items. In recent years there have been proposals to grant the FTC the power that it needs to exercise the regulatory authority that it was denied in the 1970s over today's advertisers.²⁵⁸ Regulating advertisements that prey on the minds of impressionable children needs to become a priority for the government and granting that power to the FTC would be the first step toward enabling consumers to make healthy choices.

2. Foreign Examples of Advertising Restrictions

In Europe, regulators have chosen to focus on advertising that lures consumers to the fast food restaurants rather than trying to affect consumer decisions at the point of sale.²⁵⁹ Spain was among the first of the European nations to regulate the advertisement of foods deemed to cause obesity and it did so through largely voluntary programs initially.²⁶⁰ In 2005, Spain's Ministry of Health and Consumer Affairs signed a voluntary agreement with the Spanish Federation of Hoteliers and Restaurateurs ("FEHRCAREM"). The agreement stipulated that the members of the federation would not encourage the consumption of huge individual portions in order to help further the Spanish government's initiatives to control obesity.²⁶¹ In 2006, Burger King, a member of the federation, was admonished by the Ministry for advertising its XXL burger on

²⁵⁸ McCabe, *supra* note 241, at 157.

²⁵⁹ Rodriguez-Dod, *supra* note 1, at 709.

²⁶⁰ *Id.* at 710.

²⁶¹ *Id.* at 710-11.

television.²⁶² The Ministry claimed that the XXL burger violated the agreement because it contained 971 calories, almost one-half of the recommended daily allowance for an active teenager.²⁶³ Burger King refused to pull the commercials and followed the XXL burger ads with ads for its Double Whopper, another insult to the Ministry.²⁶⁴ Burger King eventually started advertising based on the quality of its burgers instead of their size but refused to agree not to promote larger burgers in the future.²⁶⁵ This example demonstrates that voluntary programs are only as effective as their volunteers are dedicated to the cause being promoted. Spain was powerless to change Burger King's behavior because the agreement with the restaurateurs was entirely voluntary.

Mandatory regulations like those found in restaurant menu labeling and trans fat bans may be far more effective. Spain seems to have learned its lesson because it later terminated the voluntary agreement discussed above and went ahead with individual agreements with restaurateurs.²⁶⁶ Shortly after termination of the voluntary agreement the power of the Spanish Food Safety and Nutrition Agency was expanded to allow it to bring a cause of action to enjoin false or misleading advertisements to consumers relating to the nutritional value of food products.²⁶⁷ Other European countries like the United Kingdom have been successful in getting fast food chains to clean up their advertisements targeted at children by merely threatening to enact laws to ban them altogether.²⁶⁸

²⁶² *Id.* at 710.

²⁶³ *Id.* at 711.

²⁶⁴ *Id.* at 712.

²⁶⁵ Rodriguez-Dod, *supra* note 1, at 712.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *See Id.* at 712-13.

VI. REGULATION OF HARMFUL INGREDIENTS

A. Trans Fats

1. What are trans fats and why are they so bad?

Trans fat is a “bad fat” created by adding hydrogen to vegetable oils and making them into solid fats that are used commercially to extend shelf life and add taste.²⁶⁹ The solid form of trans fats is attractive to corporations because it can be stored at lower cost and used for longer periods of time.²⁷⁰ For example, trans-fatty oil can be reused in frying without losing its value, which makes it a popular for fast food restaurants that offer french fries and other fried options.²⁷¹ More important than knowing the process and use of trans fats is knowing that they contribute to heart disease and obesity.²⁷² For a long time, it was believed that trans fats were a healthy alternative to saturated fats.²⁷³ However, current research has shown that the opposite is true. Ingesting artificial trans fat is worse for the cardiac system than ingesting saturated fat.²⁷⁴ As compared to saturated fat, trans fats may be more likely to raise the levels of LDL cholesterol (“bad cholesterol”) and lower levels of HDL (“good cholesterol”).²⁷⁵ This combination sharply increases the risk of coronary heart disease, which had led to trans fats being viewed as a dangerous addition to the food industry.²⁷⁶ Consumption of trans fats can also raise the risk of diabetes more than any other form of fat.²⁷⁷ Trans fats inhibit the body’s use of insulin and may

²⁶⁹ *Id.* at 699-700.

²⁷⁰ Gabriel Edelman, *The New York City Trans Fat Ban: A Healthy Law*, 17 J.L. & Pol’y 271, 280 (2008).

²⁷¹ *Id.* at 281.

²⁷² Rodriguez-Dod, *supra* note 1, at 700.

²⁷³ Edelman, *supra* note 270, at 282.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 282-83.

²⁷⁷ *Id.* at 283.

also contribute to infertility.²⁷⁸

Trans fats add all of these health risks to a person's diet without ever contributing any nutritional advantages. Because they provide no health benefits, it has been suggested that there is no reasonable level of trans fats that should be in a diet and they should be completely eliminated from the food supply.²⁷⁹ Of course, the same could be said of other ingredients used to make foods, but trans fat is one of the only ingredients that can be easily isolated and eliminated. The vast majority of trans fats are artificial, therefore, easily avoided, and they are no recipes actually require them so they can easily be substituted with other natural ingredients that are less harmful.²⁸⁰

2. Waging War Against Trans Fats

Credit for bringing the movement against trans fats to America's attention often goes to Stephen Joseph. Joseph brought lawsuits against both Kraft and McDonalds to get them to stop using trans fats in their food preparation.²⁸¹ In 2003, he earned the nickname "cookie monster" for his suit against Kraft for their use of trans fats in the recipe for Oreo cookies.²⁸² Both Stephens' suits against McDonald's were settled and McDonald's was required to inform the public that it used trans-fat oils and to donate \$7 million to the American Heart Association.²⁸³ In 2004, he began a campaign to get restaurants in Tiburon, California to voluntarily remove trans fats from their menus.²⁸⁴ He was successful in getting all eighteen of the town's restaurants to stop using trans fats. His successful campaign got him media attention that reached as far as the

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 283-84.

²⁸⁰ Edelman, *supra* note 270, at 284.

²⁸¹ *Id.* at 285.

²⁸² *Id.* at 285-86.

²⁸³ *Id.* at 286.

²⁸⁴ *Id.* at 285.

east coast. When New York City started thinking about taking action on the trans fat issue, it enlisted the help of Stephen Joseph.²⁸⁵

In 2003, the FDA made waves by announcing that it would require that food companies disclose the trans fat content of their products on their labels right below the listing for saturated fat.²⁸⁶ The labeling requirement went into effect in January 2006.²⁸⁷ The FDA's action was based on the idea that by providing consumers with more information about trans fats, they would be enabled to make healthier decisions that would lead to healthier diets and thus reduced health costs.²⁸⁸ Before this labeling requirement, the average person didn't even know what a trans fat was.²⁸⁹ The FDA's regulation was successful in reducing the amount of trans fats in the marketplace. By the time the 2006 implementation date arrived, manufacturers had switched from trans fats to adequate substitutes and most labels had a zero trans fat listing.²⁹⁰ However, the FDA's work on the matter is far from over. The 2006 labeling requirement does not require that manufacturers list trans fats below 0.5 grams per serving.²⁹¹ Such a small quantity is not problematic in any individual item of food but when many items containing trans fats below the reporting level are eaten, the consumer will have no way of knowing how many grams of trans fat have been ingested. Nor does the FDA require any information about other harmful ingredients such as fatty acids or cholesterol content.²⁹² Those who believe trans fats have no place in a healthy diet think that all trans fat levels should be listed and the "Trans Fat Truth in

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 287.

²⁸⁷ Rodriguez-Dod, *supra* note 1, at 699; Edelman, *supra* note 270, at 287.

²⁸⁸ Edelman, *supra* note 270, at 287.

²⁸⁹ Rodriguez-Dod, *supra* note 1, at 699.

²⁹⁰ Edelman, *supra* note 270, at 287.

²⁹¹ *Id.* at 287-88.

²⁹² *Id.*

Labeling Act” has been proposed to do just that.²⁹³ Another limitation on the labeling requirement is that it does not ban food manufacturers from using trans fats in packaged foods so restaurants and bakeries are still free to use those products no matter what levels of trans fats are in the foods they prepare.²⁹⁴ Once again, because the FDA does not require the same detail in labeling for restaurants that it does for packaged foods consumers in many areas of the country remain unaware of the amount of trans fat they consume in restaurants.

In an attempt to fill the gap left by the FDA in this area, the same year that the labeling requirement for trans fats took effect, the New York City Board of Health took action on trans fats in restaurants within the city. In deciding to restrict the use of products containing trans fats, the Board noted that there is a connection between trans fat and heart disease and that heart disease is one of the city’s leading causes of death.²⁹⁵ The Board also noted that both the USDA and the American Heart Association recommended that trans fat consumption be minimized.²⁹⁶ The Board had evidence that the ban would be successful from similar trans fat restrictions abroad. At the time the Board was considering alternatives to the use of trans fats, Denmark and Canada had already taken steps to rid their countries of the problematic fat. In 2003, Denmark was the first country to introduce strict regulations on trans fat usage.²⁹⁷ In 2006, the Danish Health Ministry was already announcing a 20% decline in the rate of cardiovascular disease.²⁹⁸ The Board also noted that the Danish restrictions did not affect the quality, cost or availability of

²⁹³ *Id.* at 288.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 289.

²⁹⁶ *Id.* at 290.

²⁹⁷ Edelman, *supra* note 270, at 291. Recall that the FDA’s regulation announced in 2003 only regulated information about trans fats in nutrition labeling and not the use of trans fats in packaged foods.

²⁹⁸ *Id.*

food.²⁹⁹ This fact was of particular interest because it could help defend against backlash from the food industry about cost and consumer resistance to increased prices if more expensive alternatives were required. Canada's approach was to limit the amount of trans fats used in food service establishments to 2% of total fat in margarine and vegetable oils and 5% in all other food ingredients.³⁰⁰ Though both these plans seemed promising, the Board decided to implement a voluntary plan first.

In 2005, New York City started the Trans Fat Education Campaign, which called for restaurants in the city to voluntarily remove trans fats from their menus.³⁰¹ The campaign included programs to educate food suppliers, consumers, and every licensed restaurant in the city in an effort to convince them to voluntarily make the switch.³⁰² Unfortunately, as we have seen previously, voluntary efforts are not very successful and surveys conducted before and after the campaign showed no decline in the use of trans fats in the city.³⁰³ After the voluntary campaign's failure, the Board of Health published a notice of intention to create a trans fat ban and received overwhelming public support.³⁰⁴

The trans fat ban went into effect on July 1, 2007.³⁰⁵ In order to try to reduce the threat posed by trans fats and their resulting health issues, the city mandated that artificial trans fats be

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 292.

³⁰² *Id.*

³⁰³ Edelman, *supra* note 270, at 292.

³⁰⁴ *Id.* The New York City Board of Health received 2,200 comments in favor of the ban and only 70 comments against it.

³⁰⁵ See Section 81.08 NEW YORK CITY HEALTH CODE, 24 RCNY 81.08; *see also* New York City's Guide for Restaurants in Transition: THE REGULATION TO PHASE OUT ARTIFICIAL TRANS FATS IN NEW YORK CITY FOOD SERVICE ESTABLISHMENTS, *available at* <http://www.nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-bro.pdf>.

removed from foods served by restaurants within city limits.³⁰⁶ The ban in Section 81.08 of the New York Health Code provides an exception for food served directly to patrons in a manufacturer's original sealed package.³⁰⁷ New York's ban was implemented in two phases, most likely to appease the city's restaurants. As part of the first phase, restaurants were required to use oils, shortening, and margarines used for spreads and deep-frying that contained less than 0.5 grams of trans fat per serving.³⁰⁸ The ban allows for trans fats below a 0.5-gram threshold because the FDA labeling regulations set the 0.5 allowable threshold³⁰⁹ because the last thing the city wants is to be preempted by federal statute. The second phase, effective July 1, 2008, extended to all foods containing artificial trans fat.³¹⁰ The second phase was delayed to allow restaurants to reformulate recipes if needed.³¹¹ Enforcement of the ban is left up to the Health Department inspectors as part of their routine inspections.³¹² During the inspections, ingredient statements and nutrition labels are examined. Inspectors reserve the right to perform nutritional testing on food items to ensure compliance.³¹³

New York's campaign against trans fats appears to have been a success. Nearly all New York restaurants have been able to comply with the regulation, which already had a 96% compliance rate in the first week after implementation.³¹⁴ Some commentators fear that although the ban's goal is to improve health, it may have the opposite effect. They fear that the ban might force restaurants to fall back on other unhealthy alternatives to trans fats, particularly those that

³⁰⁶ Rodriguez-Dod, *supra* note 1, at 700; 24 RCNY 81.08.

³⁰⁷ Rodriguez-Dod, *supra* note 1, at 700.

³⁰⁸ *Id.* at 701.

³⁰⁹ Edelman, *supra* note 270, at 294.

³¹⁰ Rodriguez-Dod, *supra* note 1, at 701.

³¹¹ Edelman, *supra* note 270, at 293.

³¹² *Id.* at 294.

³¹³ *Id.*

³¹⁴ *Id.* at 295.

are high in saturated fat, which would undermine the health gains made by the trans fat ban.³¹⁵ The facts show otherwise. There is no need to substitute equally unhealthy or even unhealthier alternatives. Many fast food restaurants have successfully made the switch without sacrificing nutrition. Kentucky Fried Chicken, for example, eliminated the use of trans fats and reduced the amount of saturated fats by 20% at the same time.³¹⁶ McDonald's switched to a zero-gram trans fat canola blend oil in 14,000 of its restaurants and Taco Bell went trans fat free in all of its restaurants in April 2007.³¹⁷ In addition, the New York City Board of Health stated in its notice the even based on the most conservative estimates with trans fats being replaced by only saturated fats, there would still be a significant (though smaller) reduction in coronary heart disease following the ban.³¹⁸

By October 2008, at least twenty-seven jurisdictions had adopted or at least proposed similar laws restricting the use of trans fats.³¹⁹ Major cities like Baltimore, Boston, Chicago and San Francisco have adopted laws similar to the New York ban while others have limited the scope of their regulation to advisory guidelines or applied them only to schools.³²⁰ As more and more cities adopt trans fat restrictions there is growing concern that supplies of healthier alternatives will be too low to keep up with demand. Even the American Heart Association, which fully supports trans fat bans, has expressed concern and recommended that bans be implemented more gradually in order to ensure there is enough supply to meet the demand necessary.³²¹ With this constraint in mind, cities should be prepared to be flexible with

³¹⁵ *Id.* at 297.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* at 297-98.

³¹⁹ Rodriguez-Dod, *supra* note 1, at 701.

³²⁰ *Id.*

³²¹ Edelman, *supra* note 270, at 298-99.

implementation deadlines in order to ensure that restaurants have access to supplies of healthier oils before regulations go into effect.³²² So far, they have been able to keep on track with their proposed deadlines without any shortages.

As the Danish example demonstrates, trans fat restrictions are effective. Provided that manufacturers can continue to meet the increasing demand for healthy oil alternatives, the only question remaining is how to implement trans fat bans across the nation. Federal implementation would provide uniform regulation across the country and preempt local regulations. Enforcement might be problematic because the FDA itself indicates that inspection of restaurants is the responsibility of state and local governments.³²³ Politics dictate that local government will be more invested in enforcing regulatory measures that they are more invested in. In addition, citizens may be more supportive of regulation that they have had the opportunity to vote on via referendum rather than regulations that they feel have been imposed on them by Congress. The FDA has also failed to take further action to curb the use of trans fats since the addition to the nutrition labeling requirements. Even if the FDA does choose to implement more regulations, the timetable for federal action is much longer than that of local governments. For example, the FDA petitioned to disclose trans fat content on labels as early as 1994 but did not require compliance until more than a decade later in 2006.³²⁴ Obesity related illnesses are a serious problem and immediate solutions are needed.

The more efficient vehicle for these urgent regulations may be the state and local governments. Uniformity could still be achieved if the FDA would issue an opinion with

³²² *Id.* at 299. New York City was willing to move the deadlines for both phases of its trans fat ban by three months in order to accommodate such a problem. However, due to initiatives to increase supplies of trans-fat free oil restaurants were able to go forward without trans fats earlier than anticipated.

³²³ *Id.* at 301.

³²⁴ *Id.* at 302.

recommended guidelines for states to follow in creating their programs. It has been suggested that the powerful food industry lobby was responsible for the FDA's twelve-year delay in taking action against trans fats.³²⁵ The fact that municipal leadership is less susceptible to pressures from national lobbies like the National Restaurant Association may mean that local regulation can be more successful and implemented more quickly than regulation at the state and national level.³²⁶ Perhaps once enough localities have adopted trans fat bans, the food industry will use its tremendous lobbying power to get the federal government to take action the way that they did with restaurant menu labeling regulations. Having a uniform standard is in their best interest after all.

Public opinion also seems to be in favor of trans fat bans. The biggest argument against trans fat bans is that they are paternalistic and deny people their right to choose what they will eat.³²⁷ The National Restaurant Association has called the ban "a misguided attempt at social engineering."³²⁸ Even other consumer groups unrelated to food have expressed concern over the role the government is taking in regulating health and wellness. The Citizens Lobbying Against Smoker Harassment ("CLASH") has said that the ban shows "contempt for the public... for the marketplace, [and] principles of autonomy and choice."³²⁹ Proponents of trans fat bans believe these arguments are unfounded. They do not believe that regulation of trans fats will necessarily lead to regulation of other food ingredients. Proponents also feel the ban is justified because unlike other unhealthy and potentially harmful ingredients trans fat is "not always detectable or

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Edelman, *supra* note 270, at 303.

³²⁸ *Id.*

³²⁹ *Id.*

easily avoided by consumers.”³³⁰ Those in favor of the ban argue that trans fat bans actually increase choice by removing trans fats from restaurants where consumers would have no choice but to ingest them.³³¹ Because restaurant patrons have already relinquished so much of their control when they dine out, it would be almost impossible for them to avoid trans fats, especially when restaurants don’t list ingredients like cooking oils. When trans fats are removed from the menu entirely, people remain free to choose whatever entrée they want without worrying about whether it contains harmful trans fats.

Restaurant owners are more concerned about how the regulations will affect the flavor of their products than they are about freedom of choice and paternalism. They are concerned that healthier alternatives will make their foods taste so different that customers will no longer buy their meals at their restaurants. However, whether customers can actually taste the difference is questionable as thousands of restaurants have already made the switch without any negative results.³³² For example, McDonald’s invested a lot of resources to find a healthy trans fat alternative and conserve the signature taste and texture of its french fries and was successful.³³³ Smaller businesses are concerned that they cannot afford to reformulate their menus the way that mega fast food chains can. New York City addressed this concern by organizing resources for smaller restaurants including the Trans Fat Help Center which helps smaller restaurants switch to healthier oils while preserving their same taste and texture.³³⁴ Other programs help chefs come

³³⁰ *Id.* at 304.

³³¹ *Id.* at 304-05.

³³² *Id.* at 305-06.

³³³ Edelman, *supra* note 270, at 306-07. Several other major food manufacturers have been able to reformulate their products without the use of trans fats. Kraft was successful in removing trans fats from its Oreo cookies while conserving their original flavor. Crisco has successfully reformulated its shortening, which is great for consumers who use Crisco shortening for all their baking needs. Dunkin Donuts has also been successful in removing trans fats from its menu.

³³⁴ *Id.* at 307-08.

up with trans fat free recipes and frying methods.³³⁵

Manufacturers will adjust production to give people what they want. If consumers start to demand healthier food, the market will start to provide it for them. Following media attention given to the FDA's final regulation mandating that trans fats be included in nutrition labels manufacturers reacted by reformulating many of their products. The number of new products stating that they had "no trans fats" on the label went from 64 in 2003 to 733 in 2007.³³⁶

B. Warning labels on foods containing more than 1/3 calories from fat

In the spirit of providing consumers with the information necessary to make healthy decisions regarding their diets some states have proposed mandatory warning labels for certain high-fat menu items.³³⁷ Proponents feel that such labels would do the most to alert consumers to the dangers of consuming high-fat foods and serve to actually affect their behavior.

Researchers on the other end of the spectrum believe that warning labels are an inferior option to nutrition labels.³³⁸ They feel that rather than helping consumers make healthy decisions, warning labels will cause over-reactive behavior.³³⁹ By seeing so many warning labels on products, consumers may become desensitized to the danger of unhealthy foods. Nutrition labels contain more accurate information than broad warning labels that play on people's fears rather than allow them to make informed unbiased decisions.

³³⁵ *Id.* at 308.

³³⁶ Morrison, Mancino, & Variyam, *supra* note 78. Manufacturers responded similarly to the 2005 recommendation that at least half of a person's daily grain intake should come from whole grains. The average number of new whole-grain products went from four to sixteen per month in a five-year period.

³³⁷ Winkles, *supra* note 37, at 564.

³³⁸ *See Id.* at 563-64.

³³⁹ *Id.* Scholars have noted that California's Proposition 65 warning labels, which must be placed on items containing chemicals that could be harmful to consumers or cause cancer, has done more harm than good in that consumers will substitute higher risk items without labels for lower risk items with labels. *See* <http://oehha.ca.gov/prop65/background/p65plain.html>.

VII. CONCLUSION

There is no doubt that something has to be done to reverse the rate of obesity and overweight in this country and around the world. The current rate of disease is not sustainable over the long run. Today's overweight children will be tomorrow's overweight adults. Their health related problems will likely start earlier than those of the generation before them making the lifetime costs of their treatments even greater. The first step in addressing that problem will have to be better health and wellness education programs for America's youth coupled with more nutritious school lunches. In order to get young people eating healthy foods at home, their parents need to be educated as well. Public awareness programs like nutrition fairs in local communities can help teach entire families how to make better decisions. However, as demonstrated above, knowledge is not the only ingredient to a healthy diet, people need to have actual access to healthier foods. Farmers' markets, fairs, and government incentives to draw grocers into food deserts can help provide that access. Making sure that consumers have the information they need to make healthy choices when they eat meals away from home is critical. There is a wealth of evidence demonstrating that even the most educated individuals are incapable of choosing the right option when it is concealed by the smoke and mirrors that restaurant chains use to sell their menus. When information doesn't work, it is also necessary for the government to step in and police the food industry by preventing them from taking shortcuts and using cheap ingredients that undermine government effort elsewhere to help people make healthy choices. In a completely free market, the food industry would use the least expensive ingredients to sell items to consumers looking for the best deal for their dollar and we are already living the results of that system. Regulation is necessary in order to get consumers what they need to make healthy choices and live disease free lives.